***United States Court of Appeals***

***for the Second Circuit***


# BRIEF FOR APPELLEE

74-2571

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

----------X

FRANCIS BLOETH,

Appellant.

-against-

ERNEST L. MONTANYE, Superintendant.

Appellee.

----------X

: No. 74-2571

BRIEF FOR DEFENDANT-APPELLEE


LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendant-Appellee
Office and P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-6044

JOEL LEWITTES
LILLIAN B. COHEN
Assistant Attorneys General
Of Counsel

TABLE OF CONTENTS


| | | Page |
|---|---|---|
| Question Presented | | 1 |
| Statement | | 2 |
| Facts | | 2 |
| POINT I - | THE RECORD BEFORE THE DISTRICT COURT REQUIRED DISMISSAL OF APPELLANT'S APPLICATION FOR RELIEF UNDER THE CIVIL RIGHTS ACT | 9 |
| POINT II - | APPELLANT WAS NOT ENTITLED TO A HEARING BEFORE BEING ASSIGNED TO PROTECTIVE CUSTODY | 13 |
| Conclusion | | 16 |


TABLE OF CASES


Sostre v. McGinnis, 442 F. 2d 178, 192 (2d Cir. 1971) ..... 13

United States ex rel. Walker v. Mancusi, 338 F. Supp. 317 (W.D.N.Y. 1971), aff'd 467 F. 2d 51 (2d Cir. 1972) ..... 15, 16


OTHER AUTHORITIES


7 NYCRR § 304.1(b) ..... 15

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

----------X

FRANCIS BLOETH, :

Appellant. :

-against- : No. 74-2571

ERNEST L. MONTANYE, Superintendent. :

Appellee. :

----------X

BRIEF FOR DEFENDANT-APPELLEE

## Question Presented

Did the District Court properly dismiss appellant's claim for relief under the Civil Rights Act where appellant, upon his transfer to Attica Correctional Facility (a) was placed in protective custody on the basis of his overall record, including specific incidents of misconduct, (b) was given notice that Attica authorities were acting on the basis of his record, (c) participated in weekly conferences with the Superintendent and (d) was deprived of no other privilege than that of being a member of the general population until his transfer to another facility?

## Statement

This is an appeal from an order of the United States District Court for the Western District of New York (Curtin, J.), dated June 7, 1974, which dismissed appellant's pro se application for federal relief pursuant to 18 U.S.C. § 1983 and 42 U.S.C. § 1942.*

## Facts

Appellant is presently confined in Auburn Correctional Facility, Auburn, New York, pursuant to a conviction for murder in the first degree. Immediately prior to his confinement at Auburn he was confined at Attica Correctional Facility and it is the circumstances of his incarceration there which are in issue in this action.

According to appellant's letter, he was transferred to Attica from the Adirondack Correctional Treatment and Evaluation Center (hereinafter referred to as ACTEC) on

*Appellant commenced this action by means of a letter addressed to the District Court which the Court treated as an application for relief under the Civil Rights Act (A.6).

June 14, 1973.* The transfer to Attica was made "over [his] objection" (A.3). The day after the transfer he was placed in Housing Block Z, the principal segregation area at Attica. Upon his refusal to submit to a rectal examination he was told by the Correction Sergeant in attendance that he would be keep-locked. Appellant claimed below that he was entitled to relief because (a) he was placed in Housing Block Z "without a hearing"; (b) he was not advised of "any charges"; and (c) he was placed in keep-lock for disobeying a "degrading order" (A.4).

On July 9, 1973 the District Court ordered defendant to submit an affidavit setting forth the basis for appellant's confinement in segregation, together with a statement of the procedures followed and the safeguards provided.

*Appellant had been at ACTEC for 2 1/2 months (March, 1973 until June 14, 1973). Before that he was at Clinton Correctional Facility (December, 1972 to March, 1973); Green Haven Correctional Facility (August, 1972 to December, 1972) and Attica.

In an affidavit, dated July 20, 1973, Harold Smith, then Deputy Superintendent of Attica stated that appellant had been assigned to "HBZ, Protective Custody" because he

> "has made a rather poor institutional adjustment during the years of his incarceration and he has compiled numerous disciplinary reports. [He] is in constant defiance of institutional regulations and rules both in this facility and other facilities throughout the State. He presents a clear and eminent (sic) danger to the facility, its employees, and inmates because of his past action and current attitude"(A.9).

The affidavit further states that before the transfer was effected appellant himself "indicated that he preferred to go to Green Haven Correctional Facility as he felt that he might have problems in Attica." (A.9). Deputy Superintendent Smith explained that he was seeing appellant each week and "when, as a result of our discussions, I feel that it would be to the advantage of [appellant], and the facility for him to return to regular population I will certainly recommend it" (A.10).

There are several attachments to the Smith affidavit including copies of "form 251-C, pages 1 & 2, relative to Protective Admission and Custody Assignment Review" (A.9). This is apparently a reference to two sheets which, although unnumbered, are specifically designated "Protective Admission and Custody Assignment Review." One of these is subtitled "Superintendent's Review" and confirms appellant's assignment (A.11). The other is a report prepared by one Gerald R. Elmore, which contains information relative to (1) the offense committed by appellant, (2) his criminal background, and (3) his personal history and draws a conclusion as to his correct assignment. In this case the conclusion is virtually identical with the language used in the Smith affidavit. According to the affidavit, appellant was given copies of these sheets on June 15, 1973, as an explanation of "why he was being placed in Protective Custody" (A.10).

Also among the attachments are several copies of Form 251-C-1 captioned "Inmate Response to Protective Admission and Custody Assignment" which gives the inmate an opportunity to consent or refuse to consent to the special assignment and also notifies him of his right to communicate with the Commissioner of Correctional Services with regard to

the assignment. The first of these is dated June 20, 1973. In it appellant refuses to consent and states, "I have no knowledge of what Department regulation I have violated." He also indicates that he has no funds for stamps (A.12). According to the statement signed by a Correction Sergeant, when appellant was given the Assignment Review Form and Inmate Response on June 15, 1973 the "contents of each form was fully explained to [him] and he was given the opportunity to have any further questions answered." (A.13). A second form 251-C-1, dated June 27, 1973, contains a typed notation that appellant refused to sign it (A.19) and a third form, dated July 11, 1973 states, "I still don't know what rule I violated since arrival at Attica on June 14, 1973." (A.20).

On December 13, 1973, the District Court acknowledged the Smith affidavit of June 20 and noted that there was an apparent conflict insofar as appellant denied having received any disciplinary reports while at Green Haven, Clinton and ACTEC. The Court called for a further affidavit explaining appellant's "present status" and giving facts to support the conclusion that appellant had represented "a clear and imminent danger" (A.22).

Superintendent Smith's affidavit of January 2, 1974, states that appellant was transferred to Auburn Correctional Facility on July 20, 1973, apparently directly from Housing Block Z. The affidavit states that while at Clinton appellant was "under investigation" and that on May 11, 1975, while at ACTEC, appellant had refused an order to submit to a rectal examination. In addition, during a search of his cell a double edge razor blade was found leading to an appearance before the Adjustment Committee which counselled him. In response to the second part of the Court's order the affidavit referred to appellant's criminal record which was attached to the first Smith affidavit as evidence that appellant was a clear and imminent danger because of his "past actions and attitude" (A.25-26).

Appellant then submitted two affidavits dated January 8, 1974. The first explained that he was unable to respond to the first Smith affidavit because his legal materials had been forwarded to a Legal Aid attorney in Buffalo. He asked the Court to direct their return to him.

The second affidavit challenged the Clinton investigation referred to by Superintendent Smith and referred to a civil rights action pending in the Northern District before

District Judge Foley where the Clinton investigation was in issue (A.31). Appellant denied that any disciplinary report had been filed with respect to either of the incidents at ACTEC. He alleged that he had received an "average" conduct rating at ACTEC and that he had had responsible duties while at Attica in 1972. He further alleged that his chance for parole would be "adversely affected" by the reference in his record to the protective custody in issue.* Accordingly, he asked the Court to expunge from his record the reference to the protective custody and award him an unspecified amount of damages (A.32).

On June 7, 1974, the District Court dismissed appellant's application for federal relief. The Court noted that appellant had not controverted any of the incidents of misconduct referred to in Superintendent Smith's affidavits except to express his disagreement with the action taken.

*This point is not pursued by counsel on this appeal. In any event, it is without merit since the Protective Custody Classification is not punitive and, therefore, does not affect parole eligibility. United States ex rel. Walker v. Mancusi, 338 F. Supp. 311, 317, n. 1 (W.D.N.Y. 1971), aff'd. 467 F. 2d 51 (2d Cir. 1972).

Similarly, he did not dispute his prior criminal record except to disagree with its relevance. Accordingly, the Court found that "the action taken by prison authorities was within the discretionary authority normally given them in the area of prison administration" (A.35).

## POINT I

### THE RECORD BEFORE THE DISTRICT COURT REQUIRED DISMISSAL OF APPELLANT'S APPLICATION FOR RELIEF UNDER THE CIVIL RIGHTS ACT.

Two salient facts emerge from the record before the Court below, both of which originate with appellant. The first is that during a space of two years appellant was transferred among different state correctional facilities a total of five times. The second is that, despite his protestations that he had held responsible positions at Attica when he was confined there in 1972, he objected to being returned there less than two years later because he anticipated that he would have problems. These facts, taken together with his failure to controvert the incidents of misconduct referred to by Superintendent Smith, required the dismissal of his civil rights action.

Between August, 1972 and July, 1974 appellant was transferred from Attica to Green Haven, where he remained for four months, from Green Haven to Clinton, where he remained for four months, from Clinton to ACTEC for two and one-half months, from ACTEC to Attica for 35 days and from Attica to Auburn where he is presently confined. The longest stay at any one of these facilities, therefore, has been at Auburn, i.e., after the action at Attica of which he here complains. Were there nothing else in the record, this rapid sequence of transfers alone would support the conclusion reached in what appellant calls the "Elmore report" that appellant "has made a rather poor institutional adjustment during the years of his incarceration" (A.14).

However, the record is not so barren. There are several incidents of misconduct which appellant does not deny occurred and which thereby disprove his self-serving attempt to establish a clean record at the institutions that preceded Attica. Thus, at ACTEC and at Attica he refused direct orders to submit to rectal examinations and at ACTEC an isolated razor blade was found in his cell. Moreover appellant's activities at Clinton were being investigated by the officials there - a fact of which he is well aware and, indeed, is litigating in the Northern District.

On this record he cannot be heard to complain as he does in this Court that the "Flmore report" did not give him adequate notice of the reasons for his confinement in Housing Block Z.* In essence, appellant is challenging the fact that the officials at Attica agreed with his own appraisal that he would have problems at Attica.

Appellant's statements on Form 251-C-1 that he did not know what rule or regulation he had violated are beside the point. Except for the inconclusive incident which occurred when appellant refused to submit to a rectal examination upon

*Point I of appellant's brief assumes arguendo that he was given a copy of the "Elmore Report." However, the record below disposes of any need to indulge in speculation on this issue. Superintendent Smith's affidavit of July 20 specifically states that appellant was given a copy of "Form 251-C, pages 1 & 2" "which indicated to him why he was being placed in Protective Custody" (A.9-10). The "Elmore report" is the only annexed document which gives information about appellant's institutional record. The other documents are Superintendent's Review forms, Inmate Response forms, i.e., Form 251-C-1, a copy of appellant's criminal record and a sheet stating that appellant was given Form 251-C and Form "251-C (Inmate Response) (sic) and that the contents of each were "fully explained" and "he was given the opportunity to have any further questions answered" (A.13). Appellant never denied this statement nor did he allege that he was not given the "Elmore report" although he had ample time in which to do so.

arrival at Housing Block Z, there is nothing in the record to show that appellant was placed there for new violations of rules or regulations. On the contrary, had there been a new disciplinary action involved of which appellant was unaware, this would be an entirely different case. Superintendent Smith's affidavit precludes any such suggestion.

The Smith affidavits demonstrate that appellant was initially classified as a "protective admission" because his previous poor institutional adjustment, his defiance of institutional rules and his conduct record constituted "good cause" for restricting him "from communication with the general inmate population." 7 NYCRR § 304.1(a). It is further clear from the affidavits that despite weekly meetings between Superintendent Smith and appellant the original prognosis did not improve and culminated in appellant's transfer directly from Housing Block Z to Auburn - a transfer to which he has expressed no objection. Significantly, appellant has never challenged the fairness of his weekly meetings with Superintendent Smith or denied that during those meetings he had an adequate opportunity to discuss the nature and basis for his continued confinement in Housing Block Z.

These actions belie any intention to punish appellant. They simply represent an attempt by the authorities at Attica, based upon the knowledge of their facility and their review of appellant's records, to determine whether appellant's interests and those of the facility would be served by releasing him to general population or transferring him to another facility where special treatment might not be necessary.* As the District Court correctly held, the actions taken by the Attica Authorities were well "within the discretionary authority normally given them" (A.35). See Sostre v. McGinnis, 442 F. 2d 178, 192 (2d Cir. 1971).

## POINT II

### APPELLANT WAS NOT ENTITLED TO A HEARING BEFORE BEING ASSIGNED TO PROTECTIVE CUSTODY.

Appellant contends that even if the notice were adequate, a factual question remains as to whether a hearing was held to determine the need for his confinement in Housing Block Z. He claims he was entitled to such a hearing because he was

*Appellant was already known to the authorities at Attica, having been confined there prior to his transfer to Green Haven in August, 1972.

> "deprived of the rights to socialize, go to school, work, go to religious services, recreation and mix with the general population..." (A.32).

The District Court implicitly rejected this contention and properly so.

As support for his argument that a hearing is required, appellant attempts to color the facts to suggest that this is tantamount to a disciplinary case. Thus, he refers to notice of the "charges" against him (App. Br. 14, 15, 16) and speculates as to possible additional deprivations besides those alleged in the Court below (App. Br. 13). And while he disputes the relevance of what label attaches to his confinement, he persists in calling Housing Block Z the "disciplinary" segregation unit (App. Br. 2, 12, 19).

The fact is that there is no suggestion in the record that appellant was confined in Housing Block Z as a punishment (See Point I, supra at 11-12), or that confinement in Housing Block Z is limited to disciplinary cases. Similarly, there is no basis in the record for speculating in this Court that appellant was deprived of anything besides the right to mingle

with the general population at Attica, i.e., exactly what the "protective admission" classification contemplates.*

Appellant - who was in a position to know - did not allege that he was in isolation. Nor did he refer to the loss of any other privileges, let alone the ones referred to in his brief in this Court.** Walker v. Mancusi, 338 F. Supp. 311

---

* Protective admission applies

> "in the case of inmates who: are potential victims; or are witnesses likely to be intimidated; or lack the strength to live in the general institutional community; or must, for good cause, be restricted from communication with the general inmate population."

7 NYCRR § 304.3(b).

> "Protective confinement does restrict an inmate's movement within the facility and his contacts with inmates in the general population, but it is not punitive in intent and does not entail a loss of privileges or 'good time.'"

United States ex rel. Walker v. Mancusi, 338 F. Supp. 317, n. 1 (W.D.N.Y. 1971), aff'd 467 F. 2d 51 (2d Cir. 1972).

**There is a suggestion that appellant who was acting pro se in the District Court should not be held to niceties of pleading (App. Br. 16). However, aside from the fact that the missing allegations are highly relevant, and would have been within appellant's own knowledge, it is evident from appellant's pleadings that he is articulate and experienced. Indeed, he claims to have an I.Q. of 138 (A.4).

(W.D.N.Y. 1971) the case upon which he relies as a basis for his current speculation discusses the situation in Housing Block Z as it existed immediately after the uprising at Attica and is no evidence that appellant was subject to the same conditions a year and a half later.

In short, a hearing was not constitutionally required where, as here, the classification was non-punitive and rationally determined, appellant was deprived of no other privilege than that of participating in activities with the general population at Attica, and he himself anticipated that he would have problems at that facility. See United States ex rel. Walker v. Mancusi, supra at 318.

## CONCLUSION

THE ORDER OF THE DISTRICT COURT SHOULD BE AFFIRMED.

Dated: New York, New York
February 24, 1975

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendant-Appellee

JOEL LEWITTES
LILLIAN Z. COHEN
Assistant Attorneys General
Of Counsel